Filed 8/19/13 Golden Eagle Real Estate Investment v. Valley Athletic Club CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

GOLDEN EAGLE REAL ESTATE INVESTMENT, L.P., Plaintiff and Appellant, v. VALLEY ATHLETIC CLUB, LLC, Defendant and Appellant.	D060102, D061062 (Super. Ct. No. 37-2009-00071325-CU-BC-EC)

APPEALS from a judgment and order of the Superior Court of San Diego County, Eddie C. Sturgeon, Judge. Reversed and remanded.

James S. Munak; Eppsteiner & Fiorica Attorneys, Stuart M. Eppsteiner and Robert J. Pribish for Plaintiff and Appellant.

Boudreau Williams and Jon R. Williams for Defendant and Appellant.

Defendant Valley Athletic Club, LLC (Club) appeals a judgment after the trial court granted the motion for summary judgment filed by plaintiff Golden Eagle Real Estate Investment, L.P. (Golden) in its action against Club for breach of a lease

agreement. On appeal, Club contends there are triable issues of material fact that preclude summary judgment.

Golden appeals a postjudgment order awarding it attorney fees. In its appeal (which we treat as a cross-appeal), Golden contends the trial court abused its discretion by awarding it attorney fees in an amount less than requested.

FACTUAL AND PROCEDURAL BACKGROUND

In 1988, Club entered into an agreement (Lease) with John C. Mabee, Golden's predecessor-in-interest, pursuant to which Club leased from Mabee about 24,000 square feet of space (Premises) in an El Cajon shopping center. Apparently after subsequent amendments to the Lease, the total amount of space leased by Club is now about 29,950 square feet. The Lease provides that the landlord (Golden) has exclusive management and control of the shopping center's common areas (Common Areas). The Lease defines Common Areas as including the parking lots, grading, and other areas not reserved for the exclusive use of tenants. The Lease obligates Golden to operate, manage, maintain, and repair the Common Areas in good order and condition. It also requires Golden to provide a parking area for nonexclusive use by customers of Club and other tenants.

Section 5.3 of the Lease defines "Common Area Costs" as "all costs of operating and maintaining the Common Areas in a manner deemed by [Golden] appropriate for the best interest of Tenant and the other tenants of the Shopping Center." Those costs include, but are not limited to, Golden's "costs and expenses of maintaining, protecting, repairing, *repaving*, lighting, cleaning, painting, striping, . . . [and] cost and expense of inspecting, maintaining, repairing and replacing storm and sanitary drainage systems

. . . ." (Italics added.) The Lease requires Club to pay, as additional rent, its share of the Common Area Costs based on the ratio of the square footage of the Premises to the total square footage of the shopping center.

In 2007 and 2008, Golden apparently obtained estimates from various contractors for repairing and repaving the shopping center's parking lot. In March 2008, Golden entered into an agreement (Weir Contract) with George W. Weir Asphalt Construction, Inc. (Weir), for the following work to be done on the parking lot:

> "Remove and replace areas of severe asphalt failure to depth of 3". Grind [an] additional 29,160 square feet to a depth of 1.5". Base in with asphalt. Grind down 12,000 square feet of high areas for improved water-flow. Spray hot asphalt oil to entire lot and install paving fabric. Overlay fabric with a compacted 1.5" hotmix asphalt. 3 separate move-ins. Seal and stripe. Apply one coat satin seal after 30 day minimum cure for asphalt. Restripe existing lines and symbols. (Excludes curbs) Install 3" wide concrete swale from curb drain to street. Build and stripe speed humps (per diagram). Per Exhibit 'A', 3 pages, dated February 4, 2008, by [Weir]."

Exhibit "A" to the Weir Contract consisted of Weir's quotation, dated February 4, 2008, for certain work to be done on the parking lot. That quotation set forth six line items for certain categories of work to be performed. In one line item, Weir quoted a price of $131,640 to remove and replace areas of severe asphalt failure (17,641 square feet) to a depth of 3 inches, grind an additional 29,180 square feet to a depth of 1.5 inches, "base in" with asphalt, and grind down 12,000 square feet of high areas for improved water flow. In another line item, Weir quoted a price of $183,135 to spray hot asphalt oil on the entire lot, install paving fabric, and overlay the fabric with compacted 1.5 inches of hot mix asphalt (with three separate "move-ins"). In other line items, Weir quoted

separate prices for applying one coat of satin seal after 30 days ($14,988), restriping existing lines and symbols ($2,885), installing a 3-inch wide concrete swale from the curb drain to the street ($4,558), and building and striping speed bumps ($2,844).

Weir performed the work set forth in the Weir Contract and billed Golden $328,186.58 for that work. Golden subsequently billed Club $114,241.75 for its share of the cost of the work performed by Weir on the parking lot.

On November 30, 2010, Golden filed the instant complaint against Club, alleging it had breached the Lease by not paying $112,968.65 of the Common Area Costs it was obligated to pay. The complaint sought an award of that amount, plus interest, reasonable attorney fees, and costs. Club filed an answer that generally denied the complaint's allegations.

Golden filed a motion for summary judgment, arguing the Lease's language is unambiguous and requires Club to pay its share of the costs of the work performed by Weir on the parking lot. In support of its motion, Golden filed a separate statement of undisputed material facts, various declarations, a request for judicial notice, and an appendix of exhibits.

Club opposed the motion for summary judgment, arguing the Lease's language is ambiguous and there are triable issues of material fact regarding its obligation to pay for all or part of Weir's work on the parking lot. Club argued it is not obligated to pay for substantial improvements to the parking lot. In support of its opposition, Club filed a separate statement of undisputed facts and various declarations.

Golden filed a reply to Club's opposition. In support of its reply, Golden filed a declaration of Mike Adams, a purported expert on asphalt paving.

After hearing arguments of counsel, the trial court granted Golden's motion for summary judgment, concluding Club was obligated under the Lease to pay its share of repaving costs and rejecting, as "not persuasive," Club's argument that the term "repaving" under the Lease did not include all of Weir's work on the parking lot.

On March 17, 2011, the trial court entered judgment for Golden, awarding it damages of $112,968.65 and prejudgment interest of $22,841.33, for a total amount of $135,809.98. The court denied Club's motion for reconsideration of its summary judgment order. Club timely filed a notice of appeal challenging the judgment.

Golden filed a postjudgment motion for an award of attorney fees as the prevailing party in its action to enforce the Lease. Golden sought $94,728.75 in attorney fees. Club opposed the motion. The trial court granted Golden's motion, awarding it attorney fees of $49,020. Golden timely filed a notice of appeal challenging the amount of the attorney fee order. We subsequently granted Club's unopposed motion to consolidate Club's appeal (Case No. D060102) and Golden's appeal (Case No. D061062), with all future filings to be under Case No. D060102.

DISCUSSION

I

CLUB'S APPEAL

Summary Judgment Standard of Review

The summary judgment procedure is directed at determining whether there is evidence that requires the fact-weighing procedure of a trial. " '[T]he trial court in ruling on a motion for summary judgment is merely to determine whether such issues of fact exist, and not to decide the merits of the issues themselves.' [Citation.] The trial judge determines whether triable issues of fact exist by reviewing the affidavits and evidence before him or her and the reasonable inferences which may be drawn from those facts." (*Morgan v. Fuji Country USA, Inc.* (1995) 34 Cal.App.4th 127, 131.) However, a material issue of fact may not be resolved based on inferences if contradicted by other inferences or evidence. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856.)

To prevail on a motion for summary judgment, a defendant must show one or more elements of the plaintiff's cause of action cannot be established or there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (o).) The evidence of the moving party is strictly construed and that of the opponent liberally construed, and any doubts as to the propriety of granting the motion are to be resolved in favor of the party opposing the motion. (*Branco v. Kearny Moto Park, Inc.* (1995) 37 Cal.App.4th 184, 189.) The trial court does not weigh the evidence and inferences, but instead merely determines whether a reasonable trier of fact could find in favor of the party opposing the motion, and must deny the motion when there is some evidence that,

if believed, would support judgment in favor of the nonmoving party. (*Alexander v. Codemasters Group, Limited* (2002) 104 Cal.App.4th 129, 139.) Consequently, summary judgment should be granted only when a moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)

Because a motion for summary judgment raises only questions of law, we independently review the parties' supporting and opposing papers and apply the same standard as the trial court to determine whether there exists a triable issue of material fact. (*City of San Diego v. U.S. Gypsum Co.* (1994) 30 Cal.App.4th 575, 582; *Southern Cal. Rapid Transit Dist. v. Superior Court* (1994) 30 Cal.App.4th 713, 723.) In practical effect, we assume the role of a trial court and apply the same rules and standards governing a trial court's determination of a motion for summary judgment. (*Lopez v. University Partners* (1997) 54 Cal.App.4th 1117, 1121-1122.) We liberally construe the evidence in support of the party opposing summary judgment (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142), and assess whether the evidence would, if credited, permit the trier of fact to find in favor of the party opposing summary judgment under the applicable legal standards. (Cf. *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850.)

In reviewing de novo a trial court's grant of a motion for summary judgment, we also review de novo the interpretation of a contract "where the interpretation does not turn on the credibility of extrinsic evidence." (*Morgan v. City of Los Angeles Bd. of Pension Comrs.* (2000) 85 Cal.App.4th 836, 843.)

II

Rules of Contract Interpretation Generally

"When considering a question of contract interpretation, we apply the following rules. 'A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.' [Citation.] 'The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity. [Citation.] 'When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible . . . .' " (*WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1709 (*WYDA*).) "The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties." (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.) "The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties." (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912.)

"When a dispute arises over the meaning of contract language, the first question to be decided is whether the language is 'reasonably susceptible' to the interpretation urged by the party. If it is not, the case is over. [Citation.] If the court decides the language is reasonably susceptible to the interpretation urged, the court moves to the second question: what did the parties intend the language to mean? [Citation.] [¶] Whether the

contract is reasonably susceptible to a party's interpretation can be determined from the language of the contract itself [citation] or from extrinsic evidence of the parties' intent [citation]." (*Southern Cal. Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 847-848.) If a contract is susceptible to two different reasonable interpretations, the contract is ambiguous. (*Ibid*.) A court must then construe that ambiguous contract language "by applying the standard rules of interpretation in order to give effect to the mutual intention of the parties [citation]." (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 798.)

"Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible." (*Morey v. Vannucci, supra,* 64 Cal.App.4th at p. 912.) "The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible." (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37.) Alternatively stated, "[t]he decision whether to admit parol [i.e., extrinsic] evidence involves a two-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine 'ambiguity,' i.e., whether the language is 'reasonably susceptible' to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is 'reasonably susceptible' to the

interpretation urged, the extrinsic evidence is then admitted to aid in the second step--interpreting the contract." (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165 (*Winet*).)

On appeal, a "trial court's ruling on the threshold determination of 'ambiguity' (i.e., whether the proffered evidence is relevant to prove a meaning to which the language is reasonably susceptible) is a question of law, not of fact. [Citation.] Thus[,] the threshold determination of ambiguity is subject to independent review." (*Winet*, *supra*, 4 Cal.App.4th at p. 1165.) If the contract language is determined to be ambiguous and conflicting extrinsic evidence was admitted on the meaning of that language, "any reasonable construction will be upheld as long as it is supported by substantial evidence." (*Id*. at p. 1166.) If, however, no extrinsic evidence was admitted or the extrinsic evidence is not conflicting, the construction of the ambiguous contract language is a question of law subject to our independent construction. (*Ibid.*)

However, "[w]hen two equally plausible interpretations of the language of a contract may be made . . . parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory." (*Walter E. Heller Western, Inc. v. Tecrim Corp.* (1987) 196 Cal.App.3d 149, 158; see also *WYDA*, *supra*, 42 Cal.App.4th at p. 1713 ["Because the parol evidence is contradictory, a factual question [regarding interpretation of ambiguous contract language] arises that should not be resolved on summary judgment."].)

III

Triable Issue of Material Fact Regarding the Term "Repaving"

Club contends the trial court erred by granting Golden's motion for summary judgment because there is a triable issue of material fact regarding the meaning of the term "repaving" under the Lease and whether all of the work performed by Weir constituted "repaving" so that Club was obligated to pay its share of those costs.

A

Golden moved for summary judgment, arguing there are no triable issues of material fact on its breach of contract cause of action and it is entitled to judgment as a matter of law. Golden argued the Lease's language is unambiguous and requires Club to pay its share of the costs of the work performed by Weir on the parking lot. Golden's separate statement of undisputed material facts asserted the Lease provides that Club is required to pay its share of common area costs, including costs of repaving the parking lot. Golden asserted: "Weir performed the work consisting of grinding down areas of the Parking Lot, adding base material where needed, adding a layer of asphalt and sealing and striping the entire Parking Lot." It further asserted that Weir's repaving work "was not the construction of an entirely new parking lot." In support of its motion, Golden also submitted the declaration of Doug Schuch, the estimator for Weir who created the estimate for the parking lot work. Schuch stated the shopping center's parking lot had general cracking and areas of asphalt needed to be removed and replaced. He further stated: "The parking lot needed to be resurfaced and to properly do so, isolated parts of the parking lot needed to be removed or ground down to various depths." He stated:

"The work that Weir performed was not a complete rebuild of the parking lot. The job was to repair and repave the existing parking lot. Weir removed isolated areas of asphalt; compacted the dirt exposed in these isolated areas and refilled the asphalt to the original level; ground down other areas of asphalt; sprayed the entire lot with hot asphalt oil; installed paving fabric; overlaid the lot with 1 1/2" of new asphalt; sealed the new asphalt, and; striped the parking lot."

In opposition to the motion for summary judgment, Club argued there are triable issues of material fact that preclude summary judgment for Golden. Club argued the Lease's language is ambiguous and there are triable issues of material fact regarding its obligation to pay for all or part of Weir's work on the parking lot. Club also argued that Weir's work was a reconstruction capital improvement, not merely a repaving, and it was not obligated under the Lease to pay for substantial improvements to the parking lot. Club's separate statement disputed Golden's asserted facts describing the work performed by Weir and stating the repaving work was not the construction of an entirely new parking lot. Club asserted it had "no duty to pay for reconstruction/significant improvement under [the] Lease." Club also submitted the declaration of John P. Sipp, Jr., a purported expert in asphalt paving. Sipp stated he viewed photographs taken of the parking lot before Weir's work and visited the site to inspect the work done by Weir. He stated that before the 2008 work performed by Weir, "water was allowed to drain across the northeast parking lot directly in front of [Club's] facility causing significant ponding and degradation to the existing blacktop parking lot, or in other terms, it is called reflective cracking (alligator) and surface raveling." Sipp stated: "[I]n the asphalt

industry the term 'repaving' can mean patching or repatching which apparently [Golden] had done previously . . . ." Sipp concluded: "It is my opinion that the work performed by [Weir] was a reconstruction and/or *substantial improvement of the parking lot* except for the sealing and striping." (Italics added.)

In reply, Golden argued the mutual intent of the parties was ascertainable from the language of the Lease alone and the language is not ambiguous. Golden argued the meaning of the term "repaving" is commonly understood and does not require any expert testimony to determine its meaning. It argued the work performed by Weir was repaving. Golden noted that Sipp's declaration stated Weir's work was reconstruction and/or a substantial improvement, but does not expressly state that work was not "repaving." Importantly, Golden stated in its reply: "[Golden] *agrees* that *repaving is a substantial improvement*, and one that [Club] agreed to pay its pro-rata share of . . . ." (Italics added.) Golden also submitted Adams's declaration in which he stated: "[T]he work performed by Weir on the Shopping Center parking lot is commonly and customarily described as 'repaving' by property owners, tenants, government agencies and people working in the construction industry." He further stated: "Based on my personal experience, I know that removing sections of pavement, recompacting soil under removed pavement sections, grinding pavement, installing pavement over or in place of existing pavement, sealing, and resealing pavement is all described as repaving by contractors, owners, tenants and government agencies. Repaving is a broad term that describes most work performed to, on or about existing pavement, including removal and replacement of existing pavement, installing overlays of pavement, adding swales and

sealing pavement." Adams concluded: "Based on my many years of experience *my opinion is* that *the work* Weir performed at the Shopping Center *was repaving*." (Italics added.)

In granting Golden's motion for summary judgment, the trial court concluded Club was obligated under the Lease to pay its share of repaving costs and rejected, as "not persuasive," Club's argument that the term "repaving" under the Lease did not include all of Weir's work on the parking lot. In so doing, the court cited "Plaintiff's expert's declaration," presumably referring to Adams's declaration, quoted above, which Golden filed in support of its reply.

B

Based on our independent review of the record, we conclude there is a triable issue of material fact that precludes summary judgment for Golden in its breach of contract action against Club. We conclude there are triable issues of fact regarding the meaning of the term "repaving" under the Lease and whether all of Weir's work on the parking lot constituted "repaving" or whether at least a portion of that work constituted reconstruction or substantial improvement of the parking lot for which Club was not obligated under the Lease to share in the costs.

We assume arguendo that in moving for summary judgment Golden met its initial burden of production by submitting a copy of the Lease that contained the term "repaving" as part of Club's obligation to share in common area costs. The burden then shifted to Club to produce evidence showing there is a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(1).) Club submitted Sipp's declaration in which he

stated "the term 'repaving' can mean patching or repatching" and concluded "the work performed by [Weir] was a reconstruction and/or *substantial improvement of the parking lot* except for the sealing and striping." (Italics added.) In so doing, Club produced evidence showing the term "repaving" is, at least, ambiguous and therefore there is a triable issue of fact regarding the meaning of the term "repaving" as used in the Lease. In determining whether a contract term is ambiguous, we do not, as Golden apparently suggests, simply review the written contract itself and disregard extrinsic evidence. (*Morey v. Vannucci, supra*, 64 Cal.App.4th at p. 912; *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co., supra*, 69 Cal.2d at p. 37.) Rather, in determining whether a contract term is reasonably susceptible to two alternative meanings (i.e., is ambiguous), we apply the first step of the *Winet* test. We provisionally receive, without actually admitting, all credible evidence concerning the parties' intentions to determine whether the language is reasonably susceptible to the interpretation suggested by Club (i.e., is ambiguous). (*Winet, supra*, 4 Cal.App.4th at p. 1165.) Sipp's declaration, quoted above, is one item of such provisionally received extrinsic evidence submitted by Club. That declaration stated that repaving can mean patching or repatching. It also stated: "[T]he work performed by [Weir] was a reconstruction and/or substantial improvement of the parking lot except for the sealing and striping."

Construing that evidence favorably to Club, we conclude Sipp's statement supports a reasonable inference that repaving constitutes patching or repatching or other maintenance or repair of the parking lot and not substantial improvement of the parking lot. To the extent Golden argues Sipp's declaration is not "credible" evidence under the

Winet test, we conclude Sipp's declaration is not inherently incredible as a matter of law and therefore is properly considered in applying the first step of the *Winet* test. Because Sipp concluded Weir's work constituted reconstruction and/or substantial improvement of the parking lot, there is, at least, a triable issue of fact regarding whether all of Weir's work constituted "repaving" under the Lease or whether at least a portion of that work constituted substantial improvement of the parking lot for which Club is not obligated to share in that cost. "When two equally plausible interpretations of the language of a contract may be made . . . parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory." (*Walter E. Heller Western, Inc. v. Tecrim Corp., supra,* 196 Cal.App.3d at p. 158; see also *Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1359-1360; *WYDA, supra,* 42 Cal.App.4th at p. 1713 ["Because the parol evidence is contradictory, a factual question [regarding interpretation of ambiguous contract language] arises that should not be resolved on summary judgment."].) Therefore, the trial court erred by rejecting, as a matter of law, Club's assertion that "repaving" did not include all of Weir's work performed on the parking lot and granting Golden's motion for summary judgment.

The trial court should not have decided the meaning of the term "repaving" based on Adams's declaration in support of the motion, while apparently rejecting Sipp's declaration in opposition to the motion that supports an alternative meaning of the term. In deciding a motion for summary judgment, a trial court does not weigh the evidence and inferences, but instead merely determines whether a reasonable trier of fact could

find in favor of the party opposing the motion, and must deny the motion when there is some evidence that, if believed, would support judgment in favor of the nonmoving party. (*Alexander v. Codemasters Group, Limited*, *supra*, 104 Cal.App.4th at p. 139.) Based on our independent review of the record, we conclude a reasonable trier of fact could conclude the term "repaving" under the Lease does not include all of the work performed by Weir on the parking lot and therefore Club is not obligated to pay its share of all of the cost of Weir's work. Assuming arguendo we (and the trial court) could properly consider Adams's declaration submitted by Golden in reply, Adams's declaration, when compared to Sipp's declaration, supports, rather than detracts from, our conclusion the term "repaving" is ambiguous and precludes summary judgment for Golden. Adams states all of Weir's work constituted "repaving," while Sipp states Weir's work constituted substantial improvement of the parking lot and supports a reasonable inference that not all of Weir's work constituted "repaving." Given such conflicting evidence on the disputed meaning of the term "repaving" under the Lease, summary judgment is inappropriate and a trier of fact must determine the meaning of that term and Club's obligations under the Lease. Because we reverse the summary judgment based on the ambiguity of the term "repaving," we need not, and do not, address Club's alternative contentions in challenging the judgment.

IV

Attorney *Fee Award*

Because we reverse the summary judgment and remand for further proceedings, we also must reverse the postjudgment order awarding Golden attorney fees as the

prevailing party in this action. Therefore, we do not address the substantive issues raised by the parties in Golden's cross-appeal of the postjudgment order awarding it attorney fees.

DISPOSITION

The judgment and postjudgment order are reversed and the matter is remanded for further proceedings consistent with this opinion. Club is awarded its costs on appeal.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.